

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

IN RE:	§	CHAPTER 7
LEGENDARY FIELD EXHIBITIONS, LLC;	§	CASE NO. 19-50900-CAG
AAF PLAYERS, LLC;	§	CASE NO. 19-50902-CAG
AAF PROPERTIES, LLC'	§	CASE NO. 19-50903-CAG
EBERSOL SPORTS MEDIA GROUP, INCL;	§	CASE NO. 19-50904-CAG
LFE 2, LLC;	§	CASE NO. 19-50905-CAG
WE ARE REALTIME, LLC	§	CASE NO. 19-50906-CAG
Debtors.	§	(SUBSTANTIVE CONSOLIDATION OF ALL 6 CASES, INTO ONE CASE, LEGENDARY FIELD EXHIBITIONS, LLC, CASE NO. 19-50900-CAG) SUBSTANTIALLY ADMINISTERED UNDER CASE NO. 19-50900-CAG

This pleading requests relief that may be adverse to your interests.

If no timely response is filed within 14 days from the date of service, the relief requested herein may be granted without a hearing being held.

A timely filed response is necessary for a hearing to be held.

**SWIRL INC.'S UNOPPOSED MOTION
FOR RELIEF FROM THE AUTOMATIC STAY**

TO THE HONORABLE CRAIG A. GARGOTTA,
UNITED STATES BANKRUPTCY JUDGE:

Movant Swirl Inc. ("Swirl") moves for relief from the automatic stay pursuant to 11 U.S.C. § 362(d) and Federal Rule of Bankruptcy Procedure 4001(a) for entry of an order for relief from the automatic stay to permit Swirl to effectuate a right of setoff pursuant to section 553(a) of the Bankruptcy Code.

In support of this Motion, Swirl respectfully states as follows:

I. JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 11 U.S.C. §§ 157(a) and 1334(a).
2. This Motion is a core proceeding under 11 U.S.C. § 157(b)(2)(G).
3. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
4. The statutory and legal predicates for the relief requested herein are sections 362(d) and 553(a) of Title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”) and Federal Rule of Bankruptcy Procedure 4001(a).

II. BACKGROUND

A. Scope of Work & Staffing Plan.

5. On or around November 5, 2018, Ebersol Sports Media Group, Inc. (the “Debtor”) and Swirl entered into the Agency Services Agreement (the “Agreement”) and the Scope of Work & Staffing Plan (the “SOW”). The SOW outlines key responsibilities, deliverables and requirements associated with, among other things, strategy, creative development, media, and execution of advertising plans to be provided by Swirl. In turn, Debtor would pay Swirl commissions, fees, production expenses and media charges.

6. On January 17, 2019, Swirl provided Debtor with an invoice for work to be performed for the dates 1/22/19 – 2/18/19 of the SOW, which included the total amount due of \$600,000.00.

7. On or about January 25, 2019, Debtor issued a check to Swirl in the total amount of \$600,000.00. Out of the \$600,00.00, \$129,641.29 was provided to a third-party vendor.

8. Swirl continues to hold the total amount of \$470,358.71 (the “Payment”) to secure payment of the total amount due Swirl for dates 1/22/19 – 02/18/19 of the SOW.

B. Background Relating to the Bankruptcy Cases.

9. On April 17, 2019 (the “Petition Date”), Legendary Field Exhibitions, LLC, AAF Players, LLC, AAF Properties, LLC, the Debtor, LFE2, LLC, and We are Realtime, LLC, filed voluntary chapter 7 cases on April 19, 2019 (the “Bankruptcy Cases”). Randolph N. Osherow was appointed as Chapter 7 Trustee (the “Trustee”) for the Debtor’s bankruptcy estate (the “Estate”) in the above-styled bankruptcy case (the “Bankruptcy Case”). *See* Dkt. 4.

10. As of the Petition Date, Debtor owed Swirl at total of \$2,707,951.53 (the “Claim”).

11. On April 4, 2019, Swirl filed its Proof of Claim. *See* Claim No. 262-1.

12. Both Payment and the Claim arose prior to the Petition Date.

13. Swirl and Debtor entered into an agreement extending the deadline for the Trustee to commence any avoidance action litigation against Swirl until June 16, 2021. The Trustee did not bring any avoidance action and the deadline has passed.

14. Contemporaneously with applying the set off, Swirl intends to file an amended proof of claim to reduce its claim by the amount of the set off.

15. Counsel for Swirl and for the Trustee have extensively discussed the matter of set off and the Trustee does not oppose the relief requested.

III. RELIEF REQUESTED

16. By this Motion, Swirl seeks entry of an order, pursuant to sections 362(d)(1) and 553(a) of the Bankruptcy Code and Bankruptcy Rule 4001(a), for relief from the automatic stay to permit Swirl to set off the Payment against its Claim. The relief requested by Movant would result

in the partial payment elimination of the Claim. A proposed form of order granting the relief requested in this Motion is attached hereto as Exhibit A.

IV. ARGUMENT

A. Swirl is Entitled to Setoff under Section 553(a).

17. The right of setoff allows entities that owe each other money to apply their mutual debts against each other thereby avoiding the "absurdity of making A pay B when B owed A." *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995).

18. The right of setoff by a creditor is governed by section 553 of the Bankruptcy Code, which states, in relevant part, that:

Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that rose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case.

19. Section 553 does not create a right of setoff or prescribe how a setoff must be executed in order to be effective. Courts within the Fifth Circuit have determined a creditor must prove the following: "1. A debt exists from a creditor to the debtor and that debt arose prior to the commencement of the bankruptcy case. 2. The creditor has a claim against the debtor which arose prior to the commencement of the bankruptcy case. 3. The debt and claim are mutual obligations."

Braniff Airways, inc. v. Exxon Co., U.S.A., 814 F.2d 1030, 1035 (5th Cir. 1987).

20. Swirl had a valid and enforceable right to the Payment, which arose before the commencement of the Bankruptcy Cases. See Claim No. 262-1.

21. The Payment was provided to Swirl by the Debtor also before the Petition Date.

22. The Payment and Claim are mutual obligations because they are held by the same parties in the same capacity. See *Braniff*, 814 F.2d at 1036.

23. Here, all the requirements for setoff are satisfied.¹

B. Swirl's Right of Setoff is Warrants Relief from the Automatic Stay under Section 362(d)(1) and (2).

24. Section 362(d) of the Bankruptcy Code states the following:

- (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
 - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
 - (2) with respect to a stay of an act against property under subsection (a) of this section, if—
 - (A) The debtor does not have an equity in such property; and
 - (B) Such property is not necessary to an effective reorganization[.]

11 U.S.C. § 362(d)(1).

25. Sufficient “cause” exists for the Court to lift the automatic stay. Swirl is entitled to setoff, and the Payment cannot be utilized to maintain or preserve collateral. The Debtor does not possess an interest for the benefit of the Estate in the Payment, as the value of the Payment is an amount less than the amount of the debt due to Swirl.

26. Additionally, the Payment is not necessary for an effective reorganization, as this is a Chapter 7 case. As discussed above, the Trustee did not file any avoidance action against Swirl for the Payment before the agreed June 16, 2021, deadline. Any right of the Trustee to commence such an action is expired.

¹ For the avoidance of doubt, Swirl does not seek authority to set off prepetition claims or debts against postpetition debts or claims.

27. Therefore, Swirl requests the Court lift the automatic stay and authorize it to apply the Payment to the outstanding balance owed by the Debtor and to amend its Claim to reflect the set-off.

28. Swirl further requests waiver of the fourteen-day stay of order provision contained in Federal Rule of Bankruptcy Procedure 4001(a)(3). Since Swirl currently holds the Payment, waiver of the stay will not harm the Debtor.

V. PRAYER

WHEREFORE, Swirl requests this Court enter an Order allowing Swirl to proceed with exercising its rights and remedies with respect to effectuating a setoff of the funds currently held on account, and requiring Swirl to amend Claim 262-1 to reduce such claim by the amount of the set-off, and for such other and further relief as the Court deems just.

Dated: March 24, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 24, 2023, a true and correct copy of this document was served by electronic service on all counsel of record registered to receive notice via this Court's CM/ECF system or United States first-class mail, as indicated below.

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